Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:POSTF-104842-02
DPLeone

date: February 14, 2002

to: Gary O'Shell LMSB:1454
James Schrmack

from: Associate Area Counsel (CC:LM:MCT:CLE:PIT)

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subject: [redacted]
Consent - Tax Year Ended August 1, [redacted]

This is in response to your January 22, 2002 request for advice with respect to an extension of the statute of limitations for the tax year ended August 1, [redacted]. This memorandum should not be cited as precedent. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification. We recommend that you contact our office on the first business day more than 10 days after the date on this memorandum to see if there are any suggested modifications.

ISSUES

1. After the reverse acquisition on [redacted], what is the proper name to be used on the Form 872, Consent to Extend the Time to Assess Tax, for the consolidated income tax return filed by [redacted] for the tax year ended August 1, [redacted]?

2. Who should sign the Form 872?

ANSWERS

1. There are two different entities that have the authority to sign the Form 872 for the consolidated group for the tax year ended August 1, [redacted].

A. [redacted] (EIN [redacted]), formerly known as [redacted], as the common parent of the group for the tax year ended August 1, [redacted], has the authority to execute the consent, pursuant to Treas. Reg. § 1.1502-77(a). Additionally, [redacted], formerly known as [redacted], has the authority to execute the consent as Alternative Agent, pursuant to Temp. Treas. Reg. § 1.1502-

77T(a)(4)(i). If you have this entity sign the consent, the heading should read:

[redacted] (EIN [redacted]), formerly known as [redacted], as agent[1] for [redacted] (EIN [redacted]) [redacted] consolidated group*

* This is with respect to the consolidated federal income tax of [redacted] (EIN [redacted]) [redacted] consolidated group for the tax year ending August 1, [redacted].

B. [redacted] (EIN [redacted]), formerly known as [redacted], has the authority to execute the consent as Alternative Agent, pursuant to Treas. Reg. § 1.1502-77T(a)(4)(iv). If you have this entity sign the consent, the heading should read as follows:

[redacted] (EIN [redacted]), formerly known as [redacted], as alternative agent for [redacted], formerly known as [redacted], (EIN [redacted]) [redacted] consolidated group*

* This is with respect to the consolidated federal income tax of [redacted] (EIN [redacted]) and [redacted] consolidated group for the tax year ending [redacted].

2. If the option outlined in 1. A. above is followed, the consent should be signed by an individual authorized to act for [redacted] (EIN [redacted]), formerly known as [redacted]. If the option outlined in 1.B. above is followed, the consent should be signed by an individual authorized to act for [redacted] (EIN [redacted]

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[1] We recommend the use of "agent" as an identifier, rather than "alternative agent" since it is the Service's primary position that the common parent, so long as it remains in existence, continues as the agent. We believe we could successfully argue that the language is appropriate to indicate that [redacted] (EIN [redacted]), formerly known as [redacted], is properly the agent for the group, under either Treas. Reg. § 1.1502-77(a) or Temp. Treas. Reg. § 1.1502-77T.

[redacted]), formerly known as [redacted]. Generally, the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act may sign the consent. Rev. Rul. 84-165, 1984-2 CB 305.

FACTS

[redacted] ("[redacted]") (EIN [redacted]), a Delaware corporation, was incorporated on [redacted]. The principal activity is retail sales of clothing.

[redacted] filed a consolidated return for the tax year ended August 1, [redacted], with the following wholly owned subsidiaries: [redacted]; [redacted]; [redacted]; and [redacted].

A Plan of Reorganization and Merger Agreement, effective [redacted], was entered among [redacted], ("[redacted]"), [redacted] (a Delaware corporation and a wholly-owned subsidiary of [redacted]), [redacted], and [redacted]. It is our understanding that the closing on this merger actually took place on [redacted].

Pursuant to the stated merger plan:

1) [redacted] changed its name to [redacted].

2) [redacted] merged with and into [redacted], with [redacted] surviving, under Delaware state law. [redacted]'s name was changed to [redacted], and it became a wholly owned subsidiary of [redacted].

At the effective time of the merger, all outstanding shares of [redacted] held by [redacted] shareholders (except for the approximately [redacted]% of [redacted] shares held by [redacted], which shares were cancelled) were automatically converted into the right to receive an identical number of [redacted] common stock. Additionally, the shares of [redacted] were converted into an equal number of shares of [redacted] common stock. In essence, after the merger, [redacted] held all of the outstanding stock of [redacted], the surviving corporation in the merger with and into [redacted], while the former [redacted] shareholders had a right to receive [redacted] stock.

On the date of the merger agreement, [redacted] was authorized to issue [redacted] shares of common stock and [redacted] shares of preferred stock, and had issued and outstanding [redacted] shares of common stock and had no shares of preferred stock issued and outstanding. Prior to the merger, [redacted] declared a stock

dividend (stock split) so that, as of the effective time of the merger, the [redacted] shareholders of record immediately prior to the merger would hold [redacted] shares of [redacted].

On the date of the merger agreement, [redacted] was authorized to issue [redacted] shares, of which [redacted] were issued and outstanding, as well as an additional [redacted] shares being subject to outstanding stock options granted under [redacted]'s [redacted] stock option plan.

[redacted] indicates that it exchanged [redacted] shares of [redacted] stock for all of the [redacted] stock not held by [redacted] prior to the reorganization. No liabilities were assumed by [redacted] as a result of the exchange and the property acquired by [redacted] was not subject to any liabilities.

Since the outstanding [redacted] stock held by shareholders of record immediately prior to the acquisition was only [redacted] (pursuant to the stock split) prior to the merger, and [redacted] shares of [redacted] stock were issued in exchange for the [redacted] stock and are now held by the former [redacted] shareholders, this is a reverse acquisition because the shareholders of the acquired corporation, [redacted], now own more than 50 percent in value of the acquiring corporation, [redacted], as a result of the acquisition. Treas. Reg. § 1.1502-75(d)(3)

Due to the reverse acquisition, the former [redacted] consolidated group continues, while the former [redacted] group terminated. Additionally, [redacted] became the common parent of the surviving [redacted] consolidated group. Treas. Reg. § 1.1502-75(d)(3)(i).

The corporate existence of [redacted], now known as [redacted], a wholly-owned subsidiary of [redacted], did not terminate at any time during or after the merger transaction.

Prior to entering into the merger transaction, the parties received a private letter ruling. In the ruling, the formation of [redacted] and the merger of [redacted] and [redacted] were ignored for federal income tax purposes and instead the transaction was treated as an acquisition by [redacted] of all of the outstanding stock of [redacted] not already owned by it in exchange solely for shares in [redacted]. The merger was a reorganization under I.R.C. § 368(a)(1)(B).

DISCUSSION

[redacted], which is the now the highest tiered domestic corporation of the continuing [redacted] consolidated group, is the agent for the members of the [redacted] consolidated group for taxable years ending after the reverse acquisition.

The question which you raise here, however, is who is the agent for the members of the [redacted] consolidated group for a taxable year ending before the reverse acquisition?

Under the consolidated return regulations, the common parent of a consolidated group is the sole agent for each subsidiary in the group. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Further, the common parent for a particular consolidated return year remains the common parent agent for purposes of extending the period of limitations with respect to that year even though that corporation is no longer the common parent of that group when some action, such as consenting to an extension, needs to be taken for that year. Craigie, Inc. v. Commissioner, 84 T.C. 466, 474-475 (1985).

The general rule does not apply when the common parent is not in existence at the time such action is necessary. Treas. Reg. § 1.1502-77(d). The common parent is considered to have gone out of existence when it formally dissolves under state law or merges into another corporation. In this case, the acquiring corporation, [redacted], merged into [redacted] with [redacted] surviving the merger (albeit with a name change). [redacted] did not go out of existence. Accordingly, the general rule should still apply and [redacted], as common parent for the tax year ended August 1, [redacted], would have the authority to execute a Form 872 to extend the statute of limitations.

There was some case law, however, which created some uncertainty as to the application of the what we have termed above as the "general rule" that the common parent always remains the agent for the consolidated group.

In Southern Pacific Co. v. Commissioner, 84 T.C. 395 (1985) it was held that the new common parent after a reverse acquisition becomes the agent for the members of the group for both pre- and post-acquisition years. The Tax Court found that section 1.1502-75(d)(3) of the regulations effectively overrode the provisions in section 1.1502-77 of the regulations. Southern Pacific, 84 T.C. 395, 404. In Southern Pacific, the old common

parent ceased to exist because it was merged out of existence as part of the acquisition. Accordingly, the old common parent was no longer able to be the agent for the pre-acquisition years. When this case was decided, however, there was a concern that there would be a controversy over who could be the agent for a group in such a situation if the old common parent continued to remain in existence, particularly because the Tax Court found that the reverse acquisition section of the regulation overrode the general agency section of the regulation.

In Union Oil Co. of Cal. v. Commissioner, 101 T.C. 130 (1993), there was a merger whereby, when it was done, the subsidiary became the new common parent and the old common parent became a subsidiary of the new common parent. The Tax Court characterized this transaction as a reverse acquisition. The Internal Revenue Service sent a notice of deficiency to the old common parent for pre-merger years, and the taxpayer filed a motion to dismiss asserting that only the new common parent could be the agent for the group, relying upon Southern Pacific. In this case, the Tax Court limited Southern Pacific to its facts and held that, if the old common parent is still in existence, then both the old common parent and the new common parent are agents for the pre-acquisition years.

Due to the possible controversy over who can act for a consolidated group after an acquisition or restructuring, Temp. Treas. § 1.1502-77T was promulgated.[2] Temp. Reg. § 1.1502-77T is applicable to this case since [redacted] has ceased to be the common parent of its consolidated group, and the statute of limitation that is to be extended is for a taxable year for which the due date (without extensions) for filing the consolidated return is after September 7, 1988.

Permissible alternative agents under Temp. Reg. § 1.1502-77T(a)(4) are as follows:

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[2] Another case decided after this Temporary Regulation was drafted, Interlake Corporation v. Commissioner, 112 T.C. 103 (1999), also serves to illustrate the uncertainty about who has the authority to act when the common parent ceases to be the common parent for a group. In Interlake, the Tax Court held that the former common parent of a consolidated group did not have the authority to act for the group, at least with respect to the issuance and receipt of tentative refunds, after the former common parent became disaffiliated from the group following a spinoff.

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies;

(ii) A successor to the former common parent in a transaction to which section 381(a) applies;

(iii) The agent designated by the group under § 1.1502-77(d); or

(iv) If the group remains in existence under § 1.1502-75(d)(2) or (3) (i.e., a downstream merger or a reverse acquisition), the common parent of the group at the time the notice is mailed or the waiver given.

Under Temp. Reg. § 1.1502-77T(a)(4)(i), [redacted] ([redacted]), formerly known as [redacted], is a permissible agent to sign the consent for the consolidated group because it was the common parent for the tax year ended August 1, [redacted].

Further, under Temp. Reg. § 1.1502-77T(a)(4)(iv), [redacted] (EIN [redacted]), formerly known as [redacted], is a permissible agent to sign the consent for the consolidated group because it is the common parent of the group at this time, pursuant to Treas. Reg. § 1.1502-75(d)(3)(i).

Since either [redacted] ([redacted]), formerly known as [redacted] (old common parent) or [redacted] (EIN [redacted]), formerly known as [redacted] (new common parent) is authorized to act as an agent for the year ended August 1, [redacted], we leave it to the agent's discretion to determine which entity will execute the consent for said tax year.

Finally, since it is still a relatively new provision, we would like to remind the agent of the requirements under I.R.C. 6501(c)(4)(B). Section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of the following rights: 1) to refuse to extend the period of limitations; 2) to limit such extension to particular issues; and 3) to limit the extension to a particular period of time. This notice must be provided <u>each</u> time an extension is requested. Accordingly, please remember to advise the taxpayer, or its representative, of the section 6501(c)(4)(B) rights either orally (with contemporaneous documentation to the file) or in writing or by providing a copy of Publication 1035, <u>Extending the Tax Assessment Period.</u>

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse

effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. If you have any questions, please call Donna P. Leone at 412-644-3442.

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By:_____
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